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No. 93-982

In the Supreme Court of the United States

OCTOBER TERM, 1993

STEPHEN C. VIERRETHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 212 of the Coast Guard Authorization Act of 1989, 10 U.S.C. 1552 note (Supp. IV 1992), applies to petitions pending before the Coast Guard Board for the Correction of Military Records (BCMR) at the time the statute was enacted.

2. Assuming the statute applies to such petitions, whether the recommended draft decision by the BCMR can be considered "final" without the legally mandated review by the Secretary or the Secretary's designee.

3. Whether the Commandant of the Coast Guard possesses authority to modify his own directives with regard to the right to a hearing.

4. Whether the denial of a hearing violated petitioner's due process rights.

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-2a) is unpublished but the decision is noted at 6 F.3d 786 (Table). The opinion of the Court of Federal Claims (Pet. App. 5a-25a) is reported at 27 Ct. Cl. 357 (1992).

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1993. A petition for rehearing was denied October 14, 1993. Pet. App. 3a-4a. The petition for a writ of certiorari was filed on December 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In December, 1987, Congress enacted the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330. This law severely restricted appropriations for federal agencies in order to reduce the sizable budget deficit. To ensure that the Coast Guard's actual expenditures did not exceed its curtailed funding level, the Coast Guard attempted to reduce its manpower by instituting a voluntary early-out program. This effort failed to achieve the necessary reductions in personnel, and the Coast Guard was forced to implement an involuntary discharge program, or Reduction in Force (RIF). Pet. App. 6a-7a.

On February 23, 1988, the Coast Guard Commandant issued ALCOAST 22/88, establishing an involuntary discharge program. Pursuant to the terms of ALCOAST 22/88, all persons within an identified class were eligible for discharge at the "convenience of the government." The order suspended the opportunity for a hearing before an administrative discharge board for those individuals discharged pursuant to the involuntary discharge program. Absent the suspension effected by the ALCOAST, members of the Coast Guard with at least eight years of service would have been entitled to a pre-discharge hearing before an administrative discharge board. Pet. App. 7a-8a. In April, 1988, a Coast Guard panel approved petitioner's discharge under ALCOAST 22/88. Pet. App. 35a.

Pursuant to a separate order, ALCOAST 25/88, Coast Guard personnel who were scheduled for discharge in accordance with ALCOAST 22/88, but

who had completed 18 years of service, could be retained in the Coast Guard to complete 20 years of service, after which time they would be required to retire. At the time ALCOAST 25/88 was issued, petitioner was roughly three months short of having served for 18 years. Following the decision to discharge him, petitioner sought a waiver of the 18-year rule so that he could qualify for retirement. The Coast Guard denied this request, and petitioner was honorably discharged on June 2, 1988, with a reenlistment eligibility classification code of "RE-4" (precluding reenlistment). Pet. App. 8a-9a.

On June 3, 1988, petitioner petitioned the Coast Guard's Board for the Correction of Military Records (BCMR) seeking to invalidate his discharge. He alleged, *inter alia*, that it was unlawful to suspend the right to a hearing before an administrative discharge board prior to discharge, in part because the Due Process Clause gave him a right to such a hearing. Pet. App. 9a.

In May, 1990, the BCMR referred a preliminary draft decision to the Deputy General Counsel of the U.S. Department of Transportation for review and final action. Pet. App. 32a-40a; see 33 C.F.R. 52.64(b). The draft concluded that, by issuing ALCOAST 22/88, the Commandant had expressly rescinded the requirement for a hearing before an administrative discharge board contained in the Coast Guard Personnel Manual. Pet. App. 39a. However, the BCMR also concluded that an independent opportunity for a hearing before an administrative discharge board was provided elsewhere in the Coast Guard Administrative Investigations Manual (AIM), and that, because the Commandant's order had not specifically refer-

enced the AIM, the AIM provisions had not been affected by ALCOAST 22/88. Pet. App. 39a. This draft accordingly recommended that petitioner's discharge be declared void based upon the lack of an AIM hearing, that his records be corrected to show 20 years of service, and that he be paid all amounts due as a result. *Id.* at 40a.

After considering the BCMR's recommended draft decision, the Deputy General Counsel, as the Secretary's designee, released a final decision on April 18, 1991. Pet. App. 41a-46a. This decision adopted the BCMR's factual summary of the record, but disagreed with the draft decision's legal conclusions and denied petitioner any relief. *Ibid.* The Deputy General Counsel concluded that the Commandant's order had effectively suspended any and all opportunities for a hearing before an administrative discharge board prior to petitioner's discharge. *Ibid.* The Deputy General Counsel disagreed with the BCMR's preliminary conclusion concerning whether a separate opportunity for a hearing was created under the AIM, and concluded instead that the AIM created no independent opportunity for a hearing apart from the right provided in the Coast Guard Personnel Manual and that, even if it did, ALCOAST 22/88 would have suspended that right to a hearing as well. See *id.* at 46a-47a.

Petitioner filed suit in the Court of Federal Claims. He asserted, in pertinent part, that the Coast Guard had wrongly denied him an administrative hearing contemplated by the regulations and that due process required that he receive a hearing prior to discharge. He also argued that Section 212 of the Coast Guard Authorization Act of 1989, 10 U.S.C. 1552 note (Supp.

IV 1992), created a statutory deadline for the Secretary to take final action on petitions filed with the BCMR and that this statutory deadline applied to his petition, which was already filed when the statute became effective. He asserted that the recommended draft decision of the Board became the agency's final decision because the Secretary lost authority to act following expiration of this new deadline.

On cross-motions for summary judgment, the Court of Federal Claims granted the government's motion. Pet. App. 5a-25a. The court agreed with the BCMR and the Secretary that the Commandant had the power to suspend the right to a pre-discharge hearing under the Personnel Manual and the AIM (*id.* at 17a), and that, since an RE-4 reenlistment code is not stigmatizing, there was no right to an administrative hearing under the Due Process Clause (*id.* at 19a-23a). Because petitioner's BCMR application was filed before passage of Section 212, the court also held that that Section—which requires the Secretary to impose a ten-month deadline for final action on BCMR petitions—did not apply. *Id.* at 23a-24a. The court therefore did not reach the issue of whether Section 212 had the effect urged by petitioner, that is, of transforming a recommended decision into final agency action upon expiration of the ten-month period. The court dismissed the complaint.

On appeal, the court of appeals affirmed without opinion. Pet. App. 1a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or

any other court of appeals. Further review is therefore not warranted.

1. Petitioner argues (Pet. 11-15) that Section 212 of the Coast Guard Authorization Act of 1989, 10 U.S.C. 1552 note (Supp. IV 1992), created a ten-month statutory deadline for the Secretary to take final action on petitions filed with the BCMR and that this statutory deadline applied to his petition filed with the BCMR before the statute went into effect. The Court of Federal Claims declined to apply Section 212 to petitioner's BCMR petition. The court ruled that Section 212 was inapplicable because Congress had indicated no intent to affect then-pending applications when Section 212 was passed. Pet. App. 24a.

Petitioner argues that Section 212 is procedural or remedial in character, and thus should apply to cases pending before the BCMR when the statute became effective. Petitioner asserts that the decision below on this issue conflicts with *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974), and that the petition should be held pending *Landgraf* v. *USI Film Products*, No. 92-757, and *Rivers* v. *Roadway Express, Inc.*, No. 92-938.

Under the test articulated by the government in its amicus filing in *Landgraf*, Section 212 is a procedural statute. By its terms, it requires only that the Secretary take the procedural step of amending his regulations to provide that final action is taken on BCMR petitions within ten months.[1] Under the view asserted by the government in *Landgraf*, Section 212 should therefore apply to pending cases. However,

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[1] The regulations now require final action within ten months. 33 C.F.R. 52.2(a), 52.68.

this petition need not be held pending *Landgraf*. As discussed below, applying Section 212's ten-month rule to petitioner's pending BCMR petition does not give him the relief he seeks. Rather, it gives him at best the right to a final decision, which in this case he received six days after the deadline.

2. Petitioner argues (Pet. 16-20) that because the Secretary's final decision was issued six days after the end of the ten-month period, the recommended decision of the BCMR,[2] and not the actual final decision, must be deemed the agency's "final action." As an initial matter, and as petitioner acknowledges (Pet. 20), the courts below did not reach this issue. Review of this issue by this Court would accordingly be unwarranted.

In any event, and contrary to petitioner's assertion (Pet. 10), the issuance of a final decision after the end of the ten-month period is not contrary to *Brock* v. *Pierce County*, 476 U.S. 253 (1986). Although Section

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[2] The Coast Guard's regulations have long reserved to the Secretary's delegate the authority to issue the final decision in cases such as this one, while delegating to the BCMR responsibility only for recommending a decision. 33 C.F.R. 52.64(b); see also *Miller* v. *Lehman*, 801 F.2d 492, 497 (D.C. Cir. 1986) (Congress directed the Secretary to make the final decision). The Court of Federal Claims accurately noted that even the BCMR senior staff considers these decisions only "recommended." Pet. App. 24a. Only upon the Deputy General Counsel's signature can a recommended decision become final. Indeed, where, as here, a recommended decision is not approved by the Deputy General Counsel, it remains a nullity; it is only a decision ultimately issued by the Deputy General Counsel that becomes final agency action. Until that point, draft decisions remain no more than internal recommendations to the agency decision maker.

212 sets a deadline for agency action, Congress failed to stipulate a consequence for the agency's failure to meet that deadline. *Brock* recognizes that, without a congressionally mandated consequence, the agency does not necessarily lose the power to act beyond the ten-month deadline. 476 U.S. at 261-262. In fact, *Brock* permitted agency action to exceed a statutorily mandated deadline. *Id.* at 266. Petitioner asks this Court to disregard *Brock* and hold, in the absence of any expressed legislative intent, (1) that the agency's final decisionmaker lacked legal authority to act in this case, and (2) that, as a result of the mere passage of time during the review process, an internally recommended decision became a legally binding final decision. Neither appellate precedent nor logic supports these arguments.[3]

By enacting Section 212, Congress unmistakably sought to accelerate the overall pace of the BCMR's decisionmaking. However, no evidence exists, in either the statute or its legislative history, of congressional intent to prescribe any particular consequence for untimely action. Congress has in some contexts provided that recommended decisions within the Department of Transportation become final

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[3] As petitioner notes (Pet. 11), one district court judge recently ruled that an initial BCMR-recommended decision should be deemed final when the BCMR changed its recommendation after the ten-month deadline, and another district court judge has reached the same result. *Gazlay* v. *Busey*, 819 F. Supp. 29 (D.D.C. 1993); *Gottlieb* v. *Pena*, Civ. No. 92-1667-TPJ (D.D.C. Apr. 26, 1993). Appeals are pending in both of those cases. *Gazlay* v. *Busey*, No. 93-5183 (D.C. Cir.) (appeal pending); *Gottlieb* v. *Pena*, No. 93-5182 (D.C. Cir.) (appeal pending).

agency action when a statutory time period is not met. See 49 U.S.C. App. 1371(c)(2). In fact, in its last session Congress considered legislation that would have prescribed that result in BCMR proceedings. See H.R. 2150, 103d Cong., 1st Sess., § 204 (1993). In its final version, however, the Coast Guard Authorization Act of 1993, Pub. L. No. 103-206, 107 Stat. 2419, did not include such a provision.

Here the Secretary acted within six days of the end of the ten-month period. This case does not present an instance, like that in *Brock*, where the agency's *initial* attempt to take adverse action with regard to a party occurs after a deadline has passed. See *Brock*, 476 U.S. at 256-257 (only after 120-day statutory deadline had passed did Department of Labor take final action denying an allowance for certain costs incurred by a CETA program run by a county in the State of Washington). In contrast, here petitioner has already been discharged; petitioner sought *correction* from the BCMR and the Secretary. It is not in the general interest of those seeking such corrections to argue that a failure on the part of the BCMR or the Secretary to act within ten months removes the agency's ability to give relief. Nor is there statutory authority to elevate to "final" status a BCMR recommendation that the Secretary has not approved.

3. Petitioner argues (Pet. 20-22) that the Commandant was without authority in connection with the RIF program to modify his directives with respect to the right to a pre-discharge administrative hearing. However, even the BCMR decision that petitioner seeks to render "final" held that the Commandant possesses this authority, and that decision was upheld by the Secretary and the courts below.

That decision was correct. Congress has provided full authority to the Commandant to "issue rules, orders, and instructions, not inconsistent with law, relating to the organization, internal administration, and personnel of the Coast Guard." 14 U.S.C. 632.[4] The judiciary uniformly accords substantial deference to both the substance and procedure of military personnel decisions. *Giglio* v. *United States*, 17 Cl. Ct. 160, 170 (1989); *Taylor* v. *United States*, 22 Cl. Ct. 335, 339 (1991); *Pifer* v. *Laird*, 328 F. Supp. 649, 652 (N.D. Cal. 1971). The change here fell well within the Commandant's authority. Further, it occurred with respect to an entire class of actions—those taken in connection with the RIF—and was not an instance of an agency ignoring a regulation's application during one individual's adjudication.

4. Petitioner's discharge does not cast a stigma upon his service and does not contain derogatory connotations. The indicia of petitioner's removal include an honorable discharge, a code barring reenlistment, and the stated reason for separation given as a reduction in military strength. These factors are neutral and not derogatory. They merely indicate that petitioner was discharged as part of a general demobilization. Pet. App. 20a. The Constitution does not

[4] In fact, applicable statutes do not even require that military personnel receive advance notice of changes to internal personnel rules, such as those contained in the Coast Guard Personnel Manual and the Administrative Investigations Manual. 5 U.S.C. 552(b)(2); 44 U.S.C. 1505(a). See *Pifer* v. *Laird*, 328 F. Supp. 649, 652 (N.D. Cal. 1971); *Doe* v. *Ball*, 725 F. Supp. 1210, 1215-1216 (N.D. Fla. 1989), aff'd *sub nom. Doe* v. *Garrett*, 903 F.2d 1455, 1458-1464 (11th Cir. 1990), cert. denied, 499 U.S. 904 (1991).

provide petitioner with a due process right to a hearing in these circumstances.

Petitioner cites no case law holding that the Due Process Clause requires a hearing in connection with an RE-4 reenlistment code or that such a code is stigmatizing. On the contrary, precedent establishes that reenlistment bars are not *per se* stigmatizing and that involuntary discharges must indicate "derogatory" reasons before a hearing is required. *Keef* v. *United States*, 185 Ct. Cl. 454, 467 (1968). Here, the Court of Federal Claims properly concluded that petitioner's reenlistment code of RE-4 (denying reenlistment) and separation code denoting the reason for discharge as a general demobilization neither stigmatized him nor reflected anything derogatory about him. Pet. App. 20a.

Petitioner further asserts that his length of service necessarily creates a derogatory connotation in combination with the neutral wording of his discharge record. Pet. 25. Courts have consistently refused, however, to be swayed by the length of a litigant's service in applying principles of law concerning the propriety of discharges without hearings. Nor does longevity alone justify the imposition of a hearing requirement. *Giglio*, 17 Cl. Ct. at 169-170; *Keef*, 185 Ct. Cl. at 467-468.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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